No. 89-1816

In the Supreme Court of the United States

OCTOBER TERM, 1990

AIR COURIER CONFERENCE OF AMERICA, PETITIONER

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES POSTAL SERVICE AS RESPONDENT SUPPORTING PETITIONER

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I. The D.C. Circuit held that since the unions are within the "zone of interests" of the Private Express Statutes (PES), 18 U.S.C. 1693-1699 and 39 U.S.C. 601-606, and the Postal Reorganization Act (PRA), 39 U.S.C. 101-5605, the unions can bring this action against the Postal Service under the Administrative Procedure Act, 5 U.S.C. 701, to challenge the suspension of the PES for international remailing. We argued in our opening brief that (A) the APA does not apply to the Postal Service; (B) the unions are not within the "zone of interests" of the PES, the "relevant statutes" for purposes of the APA; (C) the unions do not have an express or implied cause of action under the PES; and (D) the unions cannot prevail under the other laws cited in their complaint. Respondents challenge only our first three arguments.

A. We argued in our opening brief that Congress "preclude[d] judicial review" under the APA, 5 U.S.C. 701 (a)(1), by adopting 39 U.S.C. 410(a). Every court but one that has addressed that issue has agreed with our interpretation of that law.[1] We also argued (at 12-20) that the D.C. Circuit erred in ruling that the unions' interest in protecting the job opportunities of postal employees satisfies the "zone of interests" test. We showed that the PES is unconcerned with the job interests of postal employees, and that the court of appeals erred in looking beyond the PES to the PRA in conducting its "zone of interests" analysis. Fed. Br. 12-20.

1. The unions concede that Section 410(a) precludes review under the APA of some actions by the Postal Service, but they argue that a decision to suspend the PES is not among them. They contend that the word "including" means "a discrete or subordinate part or item of a larger aggregate [or] group," Resp. Br. 13 (quoting *Webster's Third International Dictionary of the English Language (Unabridged)* 1143 (1986) (*Webster's*)), and that Congress intended to exempt the Postal Service from review under the APA only in connection with those internal operations ("public or Federal contracts, property, works,

[1] See *Peoples Gas, Light & Coke Co.* v. *USPS*, 658 F.2d 1182, 1191 (7th Cir. 1981); *National Easter Seal Soc'y for Crippled Children & Adults* v. *USPS*, 656 F.2d 754, 767 (D.C. Cir. 1981); *Spinks* v. *USPS*, 621 F.2d 987, 989 (9th Cir. 1980); *Lutz* v. *USPS*, 538 F. Supp. 1129, 1133 (E.D.N.Y. 1982); *Caldwell* v. *Bolger*, 520 F. Supp. 626, 628 (E.D.N.C. 1981); *NAACP* v. *USPS*, 398 F. Supp. 562, 563 (N.D. Ga. 1975); *Burns* v. *USPS*, 380 F. Supp. 623, 626 (S.D.N.Y. 1974); see also *Jordan* v. *Bolger*, 522 F. Supp. 1197, 1201-1202 (N.D. Miss. 1981), aff'd summarily, 685 F.2d 1384 (5th Cir. 1982) (Table), cert. denied, 459 U.S. 1147 (1983). But see *National Retired Teachers Ass'n* v. *USPS*, 430 F. Supp. 141, 147 (D.D.C. 1977), rev'd on other grounds, 593 F.2d 1360 (D.C. Cir. 1979).

officers, employees, budgets, or funds") listed in the first clause of Section 410(a). Resp. Br. 12-18.[2]

Respondents have misread the term "including." The term "include" means "to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate[;] * * * to take in, enfold, or comprise as a dis-

[2] Relying on an advisory opinion by the Postal Rate Commission (PRC), respondents suggest that the Postal Service has not consistently taken the position that it is exempt from the judicial review provisions of the APA. Resp. Br. 18-19 n.12. That claim is mistaken. The Postal Service and the PRC are different entities, compare 39 U.S.C. 201 (creating the Postal Service) with 39 U.S.C. 3601 (creating the PRC), and the PRC's views on this matter are not those of the Service. The PRC in its Order No. 133 also did not discuss the text of 39 U.S.C. 410(a) or 39 C.F.R. 310.7 in stating that review under the APA was available.

Respondents also contend that "the government has waived the defense that the APA is inapplicable" because we did not raise it in the lower courts. Resp. Br. 25. But the question whether the unions can obtain judicial review under the APA is not a "defense" to the unions' claims; it is a question of the authority of the courts to entertain the unions' challenge to the Postal Service's decision to suspend the operation of the PES. Respondents thus err in relying on *Jackson* v. *Seaboard C.L. R.R.*, 678 F.2d 992 (11th Cir. 1982), and *Powers* v. *Alabama Dep't of Educ.*, 854 F.2d 1285 (11th Cir.), cert. denied, 109 S. Ct. 3158 (1988), which held that a "seniority system" is a defense to a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, that must be pleaded at trial or else is waived. By contrast, *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984), supports the conclusion that this question cannot be waived. *Block* not only held that consumers cannot obtain judicial review under the APA of milk marketing orders, but also declined to decide whether the plaintiffs had standing under Article III to bring suit. *Id.* at 353 n.4. If the preclusion issue was not "in effect jurisdictional," *ibid.*, the Court could not have avoided deciding the Article III issue. The unions do not attempt to distinguish *Block*, and none of this Court's other cases cited by the unions, Resp. Br. 26, involved preclusion of review. Lastly, the question whether the APA applies to the Postal Service is a logical antecedent to whether the unions satisfy the "zone of interests" test, since that test is "most usefully understood as a gloss on the meaning of [APA] § 702." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 400-401 n.16 (1987).

crete or subordinate part or item of a larger aggregate, group, or principle * * *." *Webster's* 1143. The principal clause in Section 410(a) exempts the Postal Service from federal laws "dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds," and thereby creates a "group, class, or aggregate" of laws that are inapplicable to the Postal Service. The subordinate clause then adds to the category established by the principal clause "the provisions of chapters 5 and 7 of title 5," rendering those laws as well inapplicable to the Service. Of course, Congress could have used the phrase "as well as" in Section 410(a), which would have made clearer its intent to exempt the Postal Service from the APA. But the question is not whether the text of that Section can be improved, but how it should be read. The most natural reading of its text exempts the Postal Service from the APA.

Respondents' reading of the subordinate clause assumes that its subject matter (*i.e.*, APA review) logically is a subset of its items listed in the principal clause (*i.e.*, contracts, property, etc.). But that is not true, since the APA provides a remedy and does not define substantive rules of law. Also, limiting APA preclusion to "contracts, property, and employees" assumes that the APA otherwise applies to those areas. In fact, "agency management or personnel or * * * public property, loans, grants, benefits, or contracts" are specifically exempted from the rulemaking provisions of the APA. 5 U.S.C. 553(a)(2). The unions' interpretation of the APA preclusion in Section 410(a) ascribes to Congress the intent to exempt the Postal Service from laws that never applied to it under the APA in the first place.

Other provisions of the PRA butress our interpretation of Section 410(a). For example, Section 410(b) lists exceptions to Section 410(a) (*i.e.*, federal laws as to which the Postal Service is subject), and includes the Freedom of Information Act, 5 U.S.C. 552, the Privacy Act, 5 U.S.C. 552a, and the Government in the Sunshine Act, 5 U.S.C. 552b. 39 U.S.C. 410(b)(1). None of those laws

relates more closely than the APA to federal contracts, property, or employees, so there was no need for Congress to specify that those statutes apply to the Postal Service if the unions' reading of Section 410(a) were correct. Moreover, other provisions of the PRA specifically refer to the APA and require the Postal Service to follow APA procedures in certain instances. See 39 U.S.C. 3001(f) (proceedings concerning the mailability of matter are subject to Chapters 5 and 7 of Title 5), 3628 (decisions of the Postal Service Governors approving or modifying rate decisions of the Postal Rate Commission are subject to judicial review under the APA).[3] Those provisions would have been unnecessary if Congress had intended Section 410(a) to be given the cramped reading that the unions endorse. *National Easter Seal Soc'y for Crippled Children & Adults* v. *USPS*, 656 F.2d 754, 767 (D.C. Cir. 1981).

The unions argue that nothing in the legislative history of Section 410(a) supports our interpretation of that law. Resp. Br. 14-16. The most that can fairly be said about the legislative history of Section 410(a) is that it never specifically mentions the APA exemption,[4] and such silence hardly rises to the level of a "clearly expressed legislative intention * * * contrary" to the text of Section 410(a). *CPSC* v. *GTE Sylvania, Inc.*,

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[3] See also 39 U.S.C. 3603 (subjecting certain functions of the PRC to Chapters 5 and 7 of Title 5), 3661(c) (PRC proposals to change service having nationwide effect made subject to Sections 556 and 557 of Title 5).

[4] The Senate Report states that Section 410(a) exempts the Postal Service from "Federal laws dealing with contracts, property, the civil service system, the Budget and Accounting Act of 1921, apportionment of funds, and other laws which in most instances apply to Government agencies and functions." S. Rep. No. 912, 91st Cong., 2d Sess. 5 (1970). See also 116 Cong. Rec. 21,709 (1970) (Sen. McGee) (describing Section 410(a) as "relating to public works, contracts, employment, appropriations, budgeting, and any other laws governing agency operations"). A complete exemption from the APA easily fits within those characterizations.

447 U.S. 102, 108 (1980). In fact, "Congress' silence is just that—silence," *Alaksa Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987), and cannot impeach the text of that law. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 592 (1980); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988) ("[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history").

Interpreting Section 410(a) as a blanket exception from the APA is also sensible. The PRA sought to transform the Postal Service into a quasi-private entity with the "status of a private commercial enterprise," *Loeffler* v. *Frank*, 486 U.S. 549, 556 (1988) (citation omitted), following "modern management and business practices," H.R. Rep. No. 1104, 91st Cong., 2d Sess. 2 (1970), in order to "launch[] 'the Postal Service into the commercial world,'" *Frank*, 486 U.S. at 556 (citation omitted); *Franchise Tax Board* v. *USPS*, 467 U.S. 512, 520 (1984). That goal would have been hampered by requiring the Postal Service to operate under the APA, like any other government agency, with respect to the myriad actions necessary to run a business. Congress sensibly made the APA applicable only in those circumstances where it found public participation and judicial review more important than efficiency, and it spelled out those instances expressly in the statute. See p. 5 & n.3, *supra*.

2. The unions contend that postal workers' interests in job security fall within the "zone of interests" of the PRA, Resp. Br. 27-40, but that argument is inconsistent with this Court's decision last Term in *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177 (1990). *Lujan* explained that to be adversely affected or aggrieved within the meaning of "a relevant statute" under APA § 702, "the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected *by the statutory provision whose violation forms the legal basis for his complaint.*" 110 S. Ct. at 3186 (emphasis in original and added); *id.* at 3187 ("The relevant statute, of course, is the statute whose violation is the gravamen of the complaint."). Here, the "relevant statute[s]" are the PES, because it is the "public interest" element of 39 U.S.C. 601(b) that the Postal Service is alleged to have violated by suspending the PES for international remailing.

The unions ask the Court to ignore *Lujan* on the ground that the "zone of interests" discussion in that case is inconsistent with the Court's treatment of that issue in *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388 (1987). Resp. Br. 29-30. Not so. While *Clarke* made clear that the phrase "a relevant statute" in APA § 702 should be read "broadly," 479 U.S. at 396, *Clarke* also explained that the inquiry must still refer to the statute that is the basis for the plaintiff's legal claim. *Id.* at 401 ("we are not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes in the National Bank Act"—the law forming the basis for the plaintiff's complaint in that case). By contrast, the unions would give the phrase "a relevant statute" an interpretation so expansive that it would effectively cease to have any meaning at all. The unions' position would allow the plaintiff to cite one law to show that it is "aggrieved" under APA § 702, and an unrelated law for its legal claim. Under that approach, any plaintiff who can satisfy Article III requirements can invoke the APA. That conclusion, however, is inconsistent with the Court's decisions, which have made clear that the APA does not authorize every party adversely affected by agency action to seek judicial review. *Clarke*, 479 U.S. at 397. As we explained in our opening brief (at 17, 20), the unions' position also would allow any postal employee whose job opportunities were threatened by any agency action to bring suit under the APA. The unions disclaim any such intent, but in the one footnote that the unions devote to their response they identify no prin-

ciple limiting a postal employee's ability to sue the Postal Service. Resp. Br. 40 n.30.

The unions clearly err in asserting that the legislative history of the PRA, on which the unions heavily rely, shows that the PES were "integral parts of the overall legislative enactment" that became the PRA. Resp. Br. 38. In fact, the opposite is true. When it passed the PRA, Congress did not make any substantive change to those portions of the PES codified in the Criminal Code, 18 U.S.C. 1693-1699; Congress readopted without change those portions of the PES codified in the Postal Code, 39 U.S.C. 601-606; and Congress required the Postal Service to conduct a two-year study and reevaluation of the PES before deciding whether those laws should be modified or repealed, PRA, Pub. L. No. 91-375, § 7, 84 Stat. 783; S. Rep. No. 912, 91st Cong., 2d Sess. 22 (1970); H.R. Rep. No. 1104, *supra*, at 48. In addition, none of the documents comprising the PRA legislative history suggests that the parties concerned with postal reform saw the PES as an integral part of that legislation. The messages from President Nixon to Congress endorsing postal reform made no mention of the PES. *E.g.*, Message from the President of the United States to the Congress, H.R. Doc. No. 313, 91st Cong., 2d Sess. (1970), *reprinted in* H.R. Rep. No. 1104, *supra*, at 51-56. The President's legislative proposal, the Postal Service Act of 1969, proposed to continue the PES without substantive change pending a two-year study by the Postal Service on their modernization. H.R. 11750, 91st Cong., 1st Sess. § 7 (1969), *reprinted in Postal Modernization: Hearings on Reorganization of the Postal Establishment to Provide for Efficient and Economical Postal Service Before the Senate Comm. on Post Office and Civil Service*, 91st Cong., 1st Sess. 211-212 (1969). That provision was carried forward without discussion into subsequent versions of the legislation. The House and Senate Reports simply note that the proposed bills continue existing law without change and require the Postal Service to conduct that

study, H.R. Rep. No. 988, 91st Cong., 2d Sess. 7, 23, 41 (1970); H.R. Rep. No. 1104, *supra*, at 11, 44, 48; S. Rep. No. 912, *supra*, at 2, while the Conference Report contains no discussion of either the readoption of the PES or the proposed study, H.R. Conf. Rep. No. 1363, 91st Cong., 2d Sess. (1970).[5]

Accordingly, the unions' claim that "[t]he PES were reenacted only after Congress had given specific consideration to the need to maintain" a postal monopoly, Resp. Br. 38, is not borne out by the legislative history of the PRA upon which the unions rest their "zone of interests" argument. Perhaps the members of Congress gave this subject "specific consideration" once the Governors had presented their report on the PES to Congress. But that event took place in 1973, three years *after* the PRA became law. Board of Governors of the Postal Service, *Statutes Restricting Private Carriage of Mail and Their Administration*, H.R. Doc. No. 5, 93d Cong., 1st Sess. (Comm. Print 1973) [hereinafter *Report*].[6] There is no indication in the legislative history of the PRA that Congress gave any consideration to the PES contemporaneously with its consideration of the postal reforms that made up the PRA. Congress simply pre-

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[5] The floor debate is also unhelpful to the unions. Representative Crane introduced as an amendment a bill to repeal the PES. The amendment was defeated after two other congressmen advocated waiting for the upcoming Postal Service study. 116 Cong. Rec. 20,473-20,479 (1970). These meagre comments do not support the conclusion that the House (to say nothing of the Senate or the President) considered the PES an integral part of the reform legislation.

[6] For the same reason, the unions' claim finds no support in the statement made by the Postal Rate Commission, in its Order No. 133, that "Congress concerned itself in detail with the Postal monopoly." Resp. Br. 38 n.27. That Order was issued in 1976 three years after the Governors' report had been transmitted to Congress (six years after the PRA was adopted), after Congress had held hearings on the subject, and after Congress decided to leave the PES unchanged.

served the status quo, perhaps to avoid diverting attention from and upsetting a compromise on revisions dealing with the principal topics of reform (increased control by management over postal operations and improved employer-employee relations). But there is no basis for the unions' argument that "[t]he PES were an integral part of that legislative package." Resp. Br. 39. On the contrary, the PES were deliberately placed on a back burner. The only relationship between the PES and the PRA is that some of the PES were readopted without substantive change on the same day that the PRA became law. That relationship cannot satisfy the "zone of interests" requirement under even the most generous reading of this Court's cases.[7]

B. Invoking 39 U.S.C. 409, which waives the sovereign immunity of the Postal Service, and 28 U.S.C. 1339,

[7] Neither *Clarke* nor any earlier case assists the unions. Those decisions allowed a plaintiff to challenge a determination by the Comptroller of the Currency permitting banks to engage in certain non-banking activities. *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150 (1970), held that firms in the business of selling data processing services had standing to challenge a ruling by the Comptroller of the Currency that national banks, as an incident to their banking services, could offer data processing services to customers. *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), indicated that travel agencies would have standing to contest a determination by the Comptroller allowing banks to offer travel services. *Investment Company Inst.* v. *Camp*, 401 U.S. 617 (1971), held that investment companies had standing to seek judicial review of a decision by the Comptroller of the Currency authorizing banks to operate collective investment funds. And *Clarke* held that a trade association representing securities brokers had standing to bring suit alleging that the Comptroller exceeded his authority in approving the applications of two national banks to establish discount brokerage subsidiaries. Those decisions reflect a judgment that, in enacting the statutory framework governing the banking industry, Congress may well have been concerned, at least in part, with protecting non-bank businesses from competition by national banks. See, *e.g.*, *Clarke*, 479 U.S. at 397. Nothing in the PES or their background, however, evinces a comparable concern with protecting the job interests of postal workers.

which grants federal courts jurisdiction over cases in which the Service is a party, the unions claim that even if Section 410(a) renders the APA inapplicable, they can obtain the identical judicial review of the international remail suspension in a so-called "common law" or "non-statutory" action for review. Resp. Br. 19-25.[8] The unions seek to bring what is known as an "officer's suit," *i.e.*, an equitable action alleging that a government official has acted unconstitutionally or beyond his statutory authority, see *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and to imply a cause of action against the Postal Service from the jurisdictional provisions cited above. We argued in our opening brief (at 21-23) that, given the APA, it is dubious that a court can ever imply a cause of action against the government. We also noted (at 10-11 n.5) that Congress eliminated the "officer's suit" theory in the 1976 amendments to the APA.[9] But even if "nonstatutory judicial review"

[8] That doctrine is a misnomer, since there are no "common law" forms of action in federal court; as Justice (then professor) Scalia once wrote: "All actions in federal courts are, strictly speaking, statutory." *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich. L. Rev. 867, 870 n.12 (1970). This case illustrates why. If the unions could obtain the equivalent of APA review simply by relying on the statutes they cite, then Congress accomplished *nothing* by exempting the Postal Service from the APA, since a plaintiff can always invoke a "common law" right of review in order to obtain the same relief that the APA otherwise would afford. Laws should not be read in a manner rendering them meaningless, so the unions must identify a law expressly or impliedly granting them a cause of action to challenge the Postal Service's exercise of its suspension authority under 39 U.S.C. 601(b). The laws cited by the unions do not do so. The unions do not allege a constitutional violation, and cases implying such causes of action are not relevant here. *E.g.*, *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

[9] Congress designed the APA to serve as a single, uniform method for review of agency action, and implying causes of action can disrupt that scheme. Fed. Br. 23. Congress also eliminated

has survived to this day—and we think it has not—this case is not one in which such an action would lie.

The decisions of this Court cited by the unions upheld nonstatutory actions only when Congress impliedly authorized suit in the substantive law that a government officer was said to have violated. *Stark* v. *Wickard*, 321 U.S. 288 (1944), makes that point clearly. It held that milk producers could challenge the Secretary of Agriculture's milk marketing orders since Congress had impliedly authorized milk producers to bring suit under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601. As the Court explained, 321 U.S. at 304 (footnotes omitted):

> It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity

"officer's suits" and other forms of nonstatutory review in the 1976 amendments to the APA as an integral part of the compromise that added the waiver of the United States' sovereign immunity to APA § 702. See H.R. Rep. No. 1656, 94th Cong., 2d Sess. (1976); S. Rep. No. 996, 94th Cong., 2d Sess. (1976). The waiver of sovereign immunity in APA § 702 was subject to the other limitations of the Administrative Procedure Act, including the provisions rendering judicial review unavailable when a statute precludes review. See H.R. Rep. No. 1656, *supra*, at 27 (letter from Assistant Attorney General Scalia to Subcomm. Chairman Kennedy); S. Rep. No. 996, *supra*, at 26 (same). Under these circumstances, it would be unreasonable to imply from statutes such as 39 U.S.C. 409 and 28 U.S.C. 1339 the right to bring suit for injunctive relief that Congress has precluded under the APA. Cf. *United States* v. *Fausto*, 484 U.S. 439, 447-48 (1988) (the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified, as amended, at scattered sections of 5 U.S.C.), is the exclusive scheme for judicial review by federal employees of adverse personnel actions); *Block* v. *North Dakota*, 461 U.S. 273, 280-286 (1983) (Quiet Title Act of 1972, 28 U.S.C. 2409a, is the exclusive means of challenging the United States' title to real property); *Brown* v. *GSA*, 425 U.S. 820 (1976) (Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, is the exclusive remedy for federal employment discrimination).

> of an interest personal to him and not possessed by the people generally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers.

The Court added that "[t]o reach the dignity of a legal right in the strict sense, it must appear from the nature and character of the legislation that Congress intended to create a statutory privilege protected by judicial remedies." *Id.* at 306. The other decisions of this Court cited by the unions are to the same effect.[10]

Those cases do not assist the unions. The unions limit their theory of "nonstatutory" judicial review to instances in which the Postal Service has "violated the substantive provisions of the PRA or its own regulations," or in which "postal regulations are *ultra vires*." Resp. Br. 19. The unions do not argue, however, that the Service's construction of the "public interest" standard in Section 601(b) violates one of its regulations or is ultra vires;

[10] *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902), was an "officer's" suit challenging under the Fourth and Fifth Amendments statutes that the Postal Service read as authorizing the Service to refuse to forward mail relating to a scheme to defraud. *Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U.S. 407 (1921), was a mandamus action challenging the denial of second class mailing privileges. *Harmon* v. *Brucker*, 355 U.S. 579 (1958), permitted a suit to be brought to review the Army Review Board's decision to grant a less than honorable discharge. The Court saw the acton as one involving a nondiscretionary duty, akin to a mandamus action, and in which a servicemember had a right to an honorable discharge if certain conditions were met. See *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958) (so characterizing *Harmon*). In *Leedom* v. *Kyne*, 358 U.S. 184 (1958), the Court, relying on *Magnetic Healing*, *Stark*, and *Harmon*, held that a party could bring suit against the National Labor Relations Board challenging a unit certification for collective bargaining purposes, because Section 9(b)(1) of the National Labor Relations Act, 29 U.S.C. 159(b)(1), gave professional employees a right not to be certified under certain circumstances. *International Union, UAW* v. *Brock*, 477 U.S. 274 (1986), *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 (1962), and *Reilly* v. *Pinkus*, 338 U.S. 269 (1949), did not discuss this issue.

accordingly, their argument reduces to the claim that the Service's interpretation of Section 601(b) is simply wrong. As we have shown, Fed. Br. 13-16, 24-27, however, the PES do not impliedly confer on the unions (or anyone else) a cause of action to challenge the Service's suspension decisions, nor do the PES grant the unions (or anyone else) "an interest personal to [them] and not possessed by the people generally." *Stark*, 321 U.S. at 304. On the contrary, "public interest" determinations necessarily involve judgments made for the benefit of the public at large.

The unions claim that they can satisfy the test set forth in *Cort* v. *Ash*, 422 U.S. 66 (1975), for determining whether a private party can invoke an implied private right of action under federal law. In particular, the unions contend that they are among "the class for whose *especial* benefit the [PRA] was enacted." *Id.* at 78. See Resp. Br. 40-42. Here, too, the unions have focused on the wrong law. The PES are the pertinent statutes, because it is the Postal Service's suspension of the PES that has been challenged. But even if the unions could invoke the PRA, the relevant issues are "not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries," *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981), and whether Congress intended that such rights would "be enforced through private litigation," *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754, 771 (1981). The unions cannot make that showing.

II. In our opening brief we showed that the Postal Service carefully considered all of the relevant factors and reasonably explained why "the public interest require[d]" suspension of the PES for international remailing. 39 U.S.C. 601(a). See Fed. Br. 30-41. The unions challenge that decision on the ground that "the public ultimately must absorb, through higher postal rates, the net revenue loss to the Postal Service because of a

suspension designed to benefit only a relatively small number of firms who mail to international destinations." Resp. Br. 45.[11] The unions also claim that the Service did not consider the revenue loss from the suspension. Resp. Br. 46. Neither claim has merit.[12]

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[11] The unions erroneously claim that the court of appeals agreed with their argument. Resp. Br. 42. The court of appeals held that the suspension was arbitrary because the Service considered *only* the benefits to businesses without *also* considering the effect of the suspension on rates and services. Pet. App. 14a. In fact, the court of appeals specifically rejected the unions' claim that the benefits to businesses cannot be considered. *Id.* at 15a ("We are unwilling to say that the USPS may not consider the benefits of a proposed suspension to businesses engaged in commerce abroad, including their enhanced competitiveness in the international arena.").

[12] In a footnote, the unions claim that the Postal Service did not adequately explain why it rejected more narrowly defined suspension alternatives. Resp. Br. 42 n.32. Neither the unions nor the court of appeals, Pet. App. 15a-16a, on which the unions rely, elaborated on that claim, and it lacks merit.

Although both the court of appeals and the unions refer to "several more narrowly defined suspension alternatives," Pet. App. 15a, neither the D.C. Circuit nor the unions explain what those alternatives were. In fact, the "alternatives" at issue were proposed drafts of the suspension that were distributed by the Postal Service at the May 22, 1986, public meeting that was held in order to elicit the views of interested parties about the appropriateness and practicality of the Postal Service's proposals. J.A. 121. See 2 C.A. App. 541-603 (transcript of meeting); *id.* at 604-608 (proposals). The Postal Service, however, did not receive any significant comments on those alternatives either at that meeting or later in the rulemaking process. Proposals 2, 3, and 4 were not materially different from the regulation ultimately adopted. Proposals 1 and 5 would have required monitoring of the mail in a foreign country. Significantly, neither of the respondent unions urged the Postal Service to adopt any of these five alternatives.

This case is similar to *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519 (1978). There, the Atomic Energy Commission's decision to license a nuclear power plant was challenged under the National Environmental Policy Act of 1969, 42

A. The unions' first argument proves too much. Any suspension must be defined and limited in some way or else the PES will be nullified. The "extremely urgent letter" suspension (which the unions appear to endorse) is limited by cost or urgency-in-fact requirements; the "remail suspension" is limited by destination. Any suspension also can be used by some parties more than others. The entire public can use the international remail suspension, but it is likely that firms and other institutional mailers will have more occasion than individuals to do so.[13] What is important, however, is not whether the public can use a particular suspension, but whether the suspension advances the "public interest." Here, the Postal Service determined that, by facilitating the sending of letters,

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U.S.C. 4321, which specifically requires consideration of alternatives. In rejecting the argument that the Commission had not considered the alternative of energy conservation, the Court wrote: "[W]hile it is true that NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions. * * * [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'" 435 U.S. at 553-554. Here, the unions had the opportunity to comment on these "alternatives" both at and after the public meeting, but failed to do so. Moreover, the unions still have failed to articulate any reasonable and viable alternative that would be substantially more restrictive than the present suspension. The Postal Service, having presented the proposals in an attempt to elicit comments, should not thereby be under a burden to justify its failure to adopt such proposals after no comments were received.

[13] During the rulemaking, entities ranging from large banks to small firms commented favorably on the practice of international remailing. The diverse character of those entities suggests that the benefits of the suspension may not be narrowly limited.

international remailing will enhance the ability of American firms to compete internationally, and the record compiled during the rulemaking proceedings amply supports that conclusion. Fed. Br. 31-33.

The Postal Service may consider that factor when determining whether the "public interest requires" a suspension of the PES. 39 U.S.C. 601(b). The Service must provide "prompt, reliable, and efficient services to patrons in all areas," 39 U.S.C. 101(a), and can enter into agreements for the international conveyance of mail, 39 U.S.C. 407. Due to the PES, the Service is the principal means by which letters are sent abroad. In suspending the PES for international remailing, the Service helped American firms send letters abroad in a manner that may enable them to become more competitive in foreign markets and prompt the Service to become more efficient. Those goals are in keeping with the statutory mission of the Postal Service. In sum, the international remail suspension clearly advanced the "public interest" even if only a small number of firms are the principal users.[14]

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[14] This case is unlike *NAACP* v. *FPC*, 425 U.S. 662 (1976), which the unions invoke. Resp. Br. 43. That case held that the Federal Power Commission's duty to regulate in the "public interest" did not authorize it to prohibit discriminatory employment practices by its regulatees. The words "public interest" are "not a broad license to promote the general public welfare"; they "take meaning from the purposes of the regulatory legislation." 425 U.S. at 669. After surveying the relevant laws, the Court found that "[t]he use of the words 'public interests' in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates." *Id.* at 670. Here, the Postal Service did not suspend the PES in order to implement a policy wholly unrelated to its statutory mission. Rather, the Postal Service suspended the PES since it concluded that private carriers could provide a means of delivering letters internationally that was perceived as superior to the Service's own methods, that would benefit firms and the Service, and that would not prevent the Service from fulfilling its responsibilities. The "public interest" standard in Section 601(b) is sufficiently broad to cover such factors.

The unions also criticize the suspension on the ground that it will result in the loss of revenue to the Postal Service. Any suspension will inevitably result in the loss of some revenue, but Section 601 does not limit a suspension to instances in which the Service can turn a profit. By authorizing the Service to suspend the PES when "the public interest requires" that result, Congress concluded that the benefits of private mail carriage can outweigh the revenue loss resulting from a suspension of the Service's monopoly on the carriage of mail as well as the shifting of the burden caused by that loss. Thus, insofar as the unions' argument rests on the belief that no suspension can ever justify a revenue loss, that belief is inconsistent with the very existence of the Postal Service's suspension authority. And to the extent that the unions assume that the cost savings of international remailing were the sole reason for the suspension, the record shows that several factors persuaded the Service that a suspension was in the "public interest." 51 Fed. Reg. 29,636, 29,637 (1986) (Notice of Final Rule), *reprinted in* J.A. 102-103; Fed. Br. 32-33 & nn.14-17 (discussing the factors).[15]

In arguing that this suspension disserved the public interest, the unions rely heavily on a 1973 Report by the Board of Governors on the PES. Resp. Br. 43-44 (quoting *Report* 9). But the quoted passages were directed to the entirely different issue of whether the PES should generally be retained or modified, and not whether or how the PES should be suspended. In fact, the Gover-

[15] The unions attempt to make much of the fact that a remailer need not charge more than the Postal Service to carry letters under this suspension. Resp. Br. 44-45. But that has always been true of Express Mail in connection with the "extremely urgent letters" suspension. A $3 per letter minimum rate must be charged to carry a letter of minimum weight in compliance with the "cost" test for "extremely urgent letters." 39 C.F.R. 320.6(c). That rate has always been less than the minimum postage rate of $7.50 for the Express Mail's most widely used service in 1979, when this suspension was adopted. The comparable Express Mail rate today is $8.75.

nors wrote that "[t]he restrictions of the [PES] should be suspended where there is a definite public need for delivery service that is substantially faster than any generally available service which the Postal Service now provides." *Report* 11. After evaluating the comments received by the Service in the lengthy rulemaking proceeding in light of its expertise, the Postal Service concluded that there was a need for international remailing that the Service could not then provide.[16] That rationale is consistent with the one stated in the Report for suspending the PES.[17]

B. Respondents' second argument—that the Postal Service did not consider the revenue loss from the suspension, Resp. Br. 46—adds nothing to the D.C. Circuit's reasoning, which we have already shown to be in error. As we explained in our opening brief (at 34-35), the Postal Service assumed that the total revenue loss from a suspension would equal the total revenue from international mail. Using that overinclusive (and therefore unduly bleak) standard, the Service determined that the revenue loss from the suspension was not so severe as to outweigh the benefits to the public interest from international remailing. That is precisely the type of

[16] The unions' only response is to say that remailers could have obtained the same service under the urgent letters exception. Resp. Br. 45. (In fact, during the rulemaking, several parties—including the Department of Justice, but not the Postal Service—expressed the view that remailing was already consistent with the terms of the urgent letter exception. J.A. 48, 66.) That argument misses the point. That exception is designed for an exceptional class of letters, not ordinary business correspondence. One could just as easily say that there is no need for any suspension because the sender can always lawfully make use of a private carrier if he pays postage to the Postal Service. 39 U.S.C. 601(a).

[17] The unions also quote a 1979 notice of proposed rulemaking in connection with "extremely urgent letter" suspension, Resp. Br. 44, but that passage is unhelpful. The notice merely expresses the view that cost savings *alone* are an insufficient ground for a suspension. Here, the Postal Service concluded that several factors in addition to cost savings justified the suspension.

judgment an agency is authorized to make when hard facts are unavailable. See *Motor Vehicle Mfgs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (when the available data do not settle a regulatory issue, "the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion"); *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594-595 (1981) ("[T]he [FCC's] decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the [FCC's] ultimate conclusions is not required since a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.") (internal quotation marks omitted). The unions' argument ultimately reduces to the proposition that the Postal Service cannot act in the fact of uncertainty, but this Court's decision in cases such as *WNCN Listeners Guild* are to the contrary and support the Postal Service's action in this case.

For the foregoing reasons and those in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

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* The Solicitor General is disqualified in this case.

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